

Honorable Richard A. Jones

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF AMERICA,

Plaintiff,

v.

CRAIG T. CARR,

Defendant.

NO. 10-0222 RAJ

**SUPPLEMENTAL SENTENCING  
MEMORANDUM OF DEFENDANT  
CRAIG T. CARR**

**HEARING DATE:  
DECEMBER 10, 2010  
1:30 P.M.**

**INTRODUCTION**

Defendant Craig Carr respectfully objects to the proposed Special Condition of Supervised Release that he be subjected to, and required to pay for, the plethysmograph procedure.<sup>1</sup>

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<sup>1</sup> This is the eighth listed special condition on the Sentencing Recommendation and (although unnumbered) the fifth listed "Special Conditions of Supervision" set forth on the proposed form of Judgment, both of which have been submitted by the United States Probation Office. Penile plethysmograph testing "is a procedure that 'involves placing a pressure-sensitive device around a man's penis, presenting him with an array of sexually stimulating images, and determining his level of sexual attraction by measuring minute changes to his erectile responses.'" Jason R. Odesheo, *Of Penology and Perversity: The Use of Penile Plethysmograph on Convicted Child Sex Offenders*, 14 Temple Political & Civil Rights Law Review 1, 2 (2004).

1 The particular procedure of this proposed Special Condition should be rejected  
 2 because it is a deprivation of a significant liberty interest, is not particularly accurate or  
 3 reliable, and has not been justified by any evidence in this case.

4 Ironically, this Special Condition will expose Mr. Carr to the very circumstances or  
 5 stimuli that virtually every other Condition of his Supervised Release is trying to prevent from  
 6 occurring.  
 7

### 8 DISCUSSION

9 The general rule, of course, is that conditions of Supervised Release “are permissible  
 10 only if they are reasonably related to the goal of deterrence, protection of the public, or  
 11 rehabilitation of the offender.” *United States v. T.M.*, 330 F.3d 1235, 1240 (9th Cir. 2003).

12 “When the government seeks to restrict a defendant's liberty through a term of  
 13 supervised release, it shoulders the burden of proving that a particular condition of supervised  
 14 release involves no greater deprivation of liberty than is reasonably necessary to serve the  
 15 goals of supervised release.” *United States v. Weber*, 451 F.3d 552, 559 (9th Cir. 2006).  
 16 Moreover, before mandating such a condition, the Court must make a specific finding “of  
 17 overriding justification and a determination of medical appropriateness.” *Riggins v. Nevada*,  
 18 504 U.S. 127, 135, 112 S. Ct. 1810, 118 L. Ed. 2d 479 (1992).  
 19

20 It is also worth noting that specific proposed condition implicates a particularly  
 21 significant liberty interest, one of only three that the Ninth Circuit has identified.<sup>2</sup> *United*  
 22 *States v. Weber*, 451 F.3d at 559. When a Special Condition of Supervised Release implicates  
 23

24  
 25  
 26 <sup>2</sup> The other two conditions involved compelling a person to take antipsychotic medication  
 (*United States v. Williams*, 356 F.3d 1045, 1055 (9th Cir. 2004)) and chemical castration prescribed  
 against the will of the defendant (*United States v. Cope*, 506 F.3d 908, 919 (9th Cir. 2007)).

1 a particularly significant liberty interest, unlike many other Conditions of Supervised Release,  
 2 the Court “must support its decision on the record with record [sic] evidence that the  
 3 condition of supervised release sought to be imposed is ‘necessary to accomplish one or more  
 4 of the factors listed in § 3583(d)(1)’ and ‘involves no greater deprivation of liberty than is  
 5 reasonably necessary.’” *United States v. Weber*, 451 F.3d at 561 ((quoting *United States v.*  
 6 *Williams*, 356 F.3d. 1045, 1057 (9th Cir. 2004)).<sup>3</sup>

8 Certainly, “the existence of non-physiological, less-intrusive alternatives to  
 9 plethysmograph testing, including interviews, card-sorting, and Abel and polygraph testing,  
 10 is, self-evidently, highly relevant to the question of whether plethysmograph testing ‘involves  
 11 no greater deprivation of liberty than is reasonably necessary’ to serve the purposes of  
 12 supervised release. § 3583(d)(2)”. *United States v. Weber*, 451 F.3d at 568. In this case, there  
 13 is no evidence relevant to either criteria.

15 It is also worth noting that the Special Condition in question is not particularly reliable  
 16 or accurate. As documented by the American Psychiatric Association, the “reliability and  
 17 validity of this procedure in clinical assessment have not been well established”. *Diagnostic*  
 18 *and Statistical Manual of Mental Disorders: DSM-IV-TR* 567 (4<sup>th</sup> ed. 2000). That is, the  
 19 procedure does not necessarily perform as intended.

21 Finally, the proposed Special Condition should be rejected because it is  
 22 counterproductive. As noted, virtually all of the other Special Conditions are designed to

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25 <sup>3</sup> Certainly, “the existence of non-physiological, less-intrusive alternatives to plethysmograph  
 26 testing, including interviews, card-sorting, and Abel and polygraph testing, is, self-evidently, highly  
 relevant to the question of whether plethysmograph testing ‘involves no greater deprivation of liberty  
 than is reasonably necessary’ to serve the purposes of supervised release. § 3583(d)(2); see also  
*United States v. T.M.*, 330 F.3d at 1240.” *United States v. Weber*, 451 F.3d at 568.

1 minimize, if not prevent, Mr. Carr from being involved in certain activities. The proposed  
2 Special Condition in question will result in the exact opposite set of circumstances.

3 It is respectfully requested, therefore, that this Court reject this proposed Special  
4 Condition of Supervised Release.

5 DATED THIS 9<sup>th</sup> day of December, 2010.

6  
7 SKELLENGER BENDER, P.S.

8 By s/ Jeffrey C. Grant  
9 Jeffrey C. Grant, WSBA #11046  
10 Attorneys for Defendant Craig T. Carr  
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**CERTIFICATE OF SERVICE**

I certify that on December 9, 2010 I electronically filed Defendant Craig T. Carr's Supplemental Sentencing Memorandum and this Certificate of Service with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to Assistant United States Attorney Matthew D. Diggs.

By s/ Jule Sprenger  
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